United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6019

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

FIRST NATIONAL CITY BANK, et al.
Plaintiffs-Appellants,
76-6029

THE CHASE MANHATTAN BANK, et al.
Plaintiffs-Appellants,
76-6019

MELLON NATIONAL CORPORATION,
Plaintiff-Appellant,
76-6026

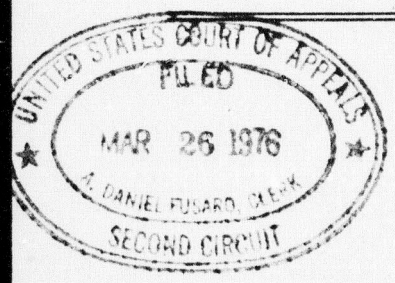
CHEMICAL NEW YORK CORPORATION, et al.
Plaintiffs-Appellants,
76-6035

MORGAN GUARANTY TRUST COMPANY, et al.
Plaintiffs-Appellants,
76-6023

—against—

FEDERAL TRADE COMMISSION, et al.
Defendants-Appellees.

JOINT BRIEF OF PLAINTIFFS-APPELLANTS



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PRELIMINARY STATEMENT

Each of the plaintiffs-appellants in these actions (hereafter collectively called the "Banks") appeals from the

Order of Hon. Marvin E. Frankel, U.S.D.J., dated December 31, 1975, dismissing its complaint.*

ISSUES PRESENTED FOR REVIEW

1. Whether it was error for the District Court to grant the motions by the Federal Trade Commission ("FTC") to dismiss the complaints in each of the cases for lack of subject matter jurisdiction and failure to state a claim.

2. Whether it was error for the District Court, having found that the plaintiff Banks had exhausted their administrative remedies, to conclude that the District Court nevertheless did not have jurisdiction to review the FTC's orders, or to entertain pre-enforcement suits for declaratory and injunctive relief against the FTC.

STATEMENT OF THE CASE

A. Nature of the Actions

These actions were commenced by the Banks seeking judicial review of agency action consisting of virtually identical orders of the FTC denying the Banks' motions to limit or quash FTC subpoenas issued to them. As relief upon such judicial review, the Banks sought declaratory judgments that the Subpoenas were in excess of the delegated powers of the FTC and beyond its investigatory authority and jurisdiction. The complaints also sought a stay, an injunction, or other appropriate relief with respect to the Subpoenas and their enforcement.

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* While the actions were not consolidated in the District Court, the appellants join in this Brief, pursuant to Rule 28(i), *Fed. R. App. P.*, as the legal issues are common to all.

B. The Parties and Course of Proceedings Below

Citibank, N.A., formerly called First National City Bank ("Citibank"), and The Chase Manhattan Bank (National Association) ("Chase") are national banking associations with their principal places of business within the City and State of New York. Chemical Bank ("Chemical") and Morgan Guaranty Trust Company of New York ("Morgan") are banking corporations organized under the laws of the State of New York with their principal places of business within the City and State of New York. Citicorp, The Chase Manhattan Corporation ("Chase Corp."), Chemical New York Corporation ("Chemical Corp.") and J. P. Morgan & Co. Incorporated ("J. P. Morgan") are bank holding companies organized under the laws of the State of Delaware and registered under the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*, with their principal places of business within the City and State of New York. Citibank, Chase, Chemical and Morgan are wholly-owned subsidiaries of Citicorp, Chase Corp., Chemical Corp. and J. P. Morgan, respectively.

Mellon National Corporation ("Mellon Corp.") is a bank holding company organized under the laws of the Commonwealth of Pennsylvania and registered under the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.*, with its principal place of business in Pennsylvania. Mellon Bank, N.A., a national banking association ("Mellon")*, is a wholly-owned subsidiary of Mellon Corp. with its principal place of business in Pennsylvania.

In June 1975 the FTC issued essentially identical *Subpoenas Duces Tecum*, addressed to the Chairmen of Citicorp, Chase Corp., Chemical Corp., J. P. Morgan and Mellon Corp., directing each to appear before an Attorney and Examiner of the FTC, on July 18, 1975 in Washington, D.C. (the "Subpoenas"). Each Subpoena demanded the pro-

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* Not a party to these proceedings.

duction of 55 subcategories of documents, specified in its nine page, single-spaced "Schedule of Documents", not just from the bank holding companies, but principally from their banking subsidiaries*.

Before the July 18 return date of the Subpoenas, the respondents filed with the FTC timely motions, pursuant to the FTC's Rules of Practice, to limit or quash the Subpoenas on the grounds (1) that the Subpoenas exceeded the jurisdiction of the FTC, and were an attempt to investigate banking which is specifically excluded from the FTC's investigative and regulatory jurisdiction, and (2) that the Subpoenas were unduly burdensome. No written response to the motions was served by the FTC's Staff Counsel.

In August, the FTC issued a Decision and Order in response to each motion in the form of substantially identical letters, dated August 21, 1975**. The Decisions and Orders made inconsequential modifications to the Subpoenas and otherwise denied the motions and ordered the respondents to appear to testify, and produce the demanded documents, on September 12, 1975.

To obtain judicial review of the administrative action of the FTC represented by the Decisions and Orders, the Banks commenced these actions in the United States District Court for the Southern District of New York.

The FTC did not answer the complaints, but instead, on October 2, 1975, filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim.

Subsequently, some 3½ months after the complaints were filed below but before the FTC's motions to dismiss were decided, the FTC commenced a proceeding in the United States District Court for the District of Colum-

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* Appendix at A-23, A-53, A-131, A-164, A-209.

** Appendix at A-38, A-111, A-145, A-179, A-241.

bia*, for enforcement of the same Subpoenas that were already *sub judice* in the court below.**

On December 31, 1975, Judge Frankel of the District Court below granted the FTC's motions to dismiss the complaints, and the Banks are here on appeal from his Memorandum Decision and Order.

C. Statement of Facts

The Subpoenas served upon the Banks in July 1975 (in form addressed to the Chairman of each bank holding company) demanded a sweeping disclosure, covering a ten year period, of internal banking affairs and relationships with bank customers engaged in various "energy" industries.

The Subpoenas were issued pursuant to four FTC Resolutions. Three Resolutions, dated April 16, 1974, defined the nature and scope of the FTC's investigation to be ". . . all pertinent aspects of the structure, conduct and performance of the nuclear energy industry . . .," of ". . . the natural gas industry . . .," and of ". . . the coal industry . . .," and further stated that the ". . . information received pursuant to compulsory process which pertains to possible violations of Section 5 of the Federal Trade Commission Act and/or Sections 7 and 8 of the Clayton Act may be utilized in conducting specific investigations thereof."***

The fourth Resolution, dated September 12, 1974, further defined the nature and scope of the investigation to be:

> "To determine the extent and effects of direct and indirect interlocking directorates, and other interlocking personnel and business relationships among domestic petroleum companies and between such companies and financial institutions and to determine

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* *FTC* v. *Rockefeller*, Misc. No. 75-0229 (D. D.C., filed Dec. 19, 1975).

** The Banks have filed motions with the District of Columbia court to transfer or, in the alternative, stay that proceeding. Argument of those motions is scheduled for April 8, 1976.

*** Appendix at A-64-66.

whether or not such interlocking relationships may be in violation of Section 8 of the Clayton Act or may result in unfair methods of competition or unfair acts or practices within the meaning of Section 5 of the Federal Trade Commission Act."*

Describing the fourth Resolution, FTC Staff Counsel advised the Court below that ". . . banks [had] become a natural focus of the Commission's investigation". FTC Memorandum of Law in support of Motion to Dismiss, p. 7.

The Banks promptly filed motions with the FTC to modify and limit the Subpoenas to relevant matters within the jurisdiction and investigatory authority of the FTC, or in lieu thereof to quash the Subpoenas. The Banks noted that the Subpoenas called for extensive production of books, records and documents from banking institutions not subject to FTC jurisdiction, and that the material sought was not limited to information necessary to the investigation of non-banking organizations as might be permissible under the new, narrow exception of § 6(h) of the FTC Act.**

With minor changes of more cosmetic than real significance, the FTC Subpoenas were sustained by the FTC, the Banks' motions denied, and the respondents ordered to appear in Washington on September 12, with all the material demanded.

The Schedule of Documents subpoenaed is reproduced in full at pages A-24 *et seq.* of the Appendix. Merely to illustrate, however, the scope of the FTC's desired incursion into the banking business, the Schedule demands:

"3. Such documents as will show . . .

* * *

(c) statements of goals, strategies, plans of action for the growth, performance and development

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* Appendix at A-67.

** Added by Title IV of Pub. L. No. 93-153, 87 Stat. 576. *See* Point IIA, (1), *infra.*

of your bank during the [10 year] subpoena period to the extent that they apply to or affect the energy departments . . .

* * *

11. With regard to meetings of the Board of Directors, the Executive Committee of the Board and the Examining Committee of the Board of your bank supply for the subpoena period:

(a) copies of agenda, and

(b) copies of all documents memorializing deliberations of their meetings at which directors who were simultaneously directors of energy companies were present."

Since each of the Banks had at least one director who was also a director of an "energy company", as defined, the latter demand would, as a practical matter, require production of all documents for all of the Banks' board of director meetings for a ten year period with no limitations whatever.

In the face of the FTC Decisions and Orders, the Banks were faced with the following choices:

(1) Attempt to comply with the Subpoenas, despite the fact that the Banks believed them to be improper, unauthorized, and unlawfully and unconstitutionally burdensome; or

(2) Refuse to comply, in face of the FTC's threat that the Subpoena "subjects you to the penalty imposed by law for failure to appear"*—the criminal sanctions in § 10 of the FTC Act**; or

(3) Seek judicial review and relief.

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* Appendix at A-20.

** 15 U.S.C. § 50. *See* Point II, B, *infra*.

The risks involved in a volitional default were, as a purely pragmatic matter, made particularly painful in view of the fact that each of the Subpoenas was directed personally to the Chairman of the respondent Bank. While it might be argued that such fact rendered the likelihood of criminal prosecution remote, gambling with the person of the Banks' senior officers was obviously not regarded with frivolity.

The Banks chose to seek judicial relief. The FTC, instead of meeting the issues of its authority and jurisdiction on the merits, challenged by motion the District Court's jurisdiction to provide judicial review, and to grant the requested relief.

ARGUMENT

Summary of Argument

The District Court was in error in dismissing the Banks' complaints, since the Court did have subject matter jurisdiction and the complaints did state claims upon which relief could be granted.

As the complaints alleged the District Court had jurisdiction under 28 U.S.C. § 1337, as a case arising under an Act of Congress regulating commerce, the FTC Act. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). Necessarily, therefore, the District Court also had jurisdiction under 28 U.S.C. § 1331, as a case arising under the laws of the United States.*

The complaints stated claims for relief under the Administrative Procedure Act and the Declaratory Judgment Act, through judicial review of "agency action" by the FTC. There is no provision of the FTC Act ". . . that explicitly prohibits judicial review", *Dunlop* v. *Bachowski*, 421

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* In that regard, the FTC has not claimed that the jurisdictional amount was not met.

U.S. at 566, of the FTC's orders. Accordingly, the District Court had subject matter jurisdiction and the Banks should not have been precluded *ab initio* from pursuing their claims for declaratory and injunctive relief. *A. O. Smith Corp.* v. *FTC*, Civil Nos. 75-1282/89 (3d Cir. Feb. 11, 1976)*.

The FTC's Orders were "final agency action", ripe for review and subject to the judicial relief sought, even though the Subpoenas were not self-enforcing. *A. O. Smith Corp.* v. *FTC* (Addendum at 14). The Banks' challenges to the FTC's authority and jurisdiction raise purely legal issues. Withholding judicial review results in direct and immediate hardship to the appellant Banks.

POINT I

The District Court Had Subject Matter Jurisdiction of These Actions.

These actions arose under the FTC Act, 15 U.S.C. §§ 41 *et seq.*, and other Constitutional and federal statutory provisions**. The amount in controversy as to each plaintiff exceeds $10,000 exclusive of interest and costs. Since these actions give rise to a federal question, and arise under acts of Congress regulating commerce, the District Court was vested with subject matter jurisdiction. 28 U.S.C. § 1331; 28 U.S.C. § 1337; *A. O. Smith Corp.* v. *FTC* (Addendum at 10-13); *Exxon Corp.* v. *FTC*, Civil No. 75-167

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* The decision of the United States Court of Appeals for the Third Circuit in *A. O. Smith Corp.* v. *FTC* is not yet officially reported. For the convenience of the Court and the parties, the text of the decision is included as an Addendum to this Brief.

** The Fourth and Fifth Amendments of the United States Constitution, the Clayton Act, 15 U.S.C. §§ 12 *et seq.*, the National Bank Act, 12 U.S.C. §§ 21 *et seq.*, the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

(D. Del. Jan. 30, 1976)*; *cf. Dunlop* v. *Bachowski*, 421 U.S. at 566.

The District Court's refusal to exercise jurisdiction was contrary to judicial policy and the declared intent of Congress to provide judicial review to any person aggrieved by a final administrative action. Administrative Procedure Act § 10, 5 U.S.C. §§ 702-05; *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 139-41 (1967); *A. O. Smith Corp.* v. *FTC* (Addendum at 13).

As the Third Circuit recently held, ". . . the paramount principles today in deciding whether federal courts have jurisdiction to review administrative actions derive from the Supreme Court's 1967 *Abbott Laboratories* trilogy, recently reaffirmed in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975)." *A. O. Smith Corp.* v. *FTC* (Addendum at 12). The Supreme Court declared, in *Abbott Laboratories*, that embodied in the Administrative Procedure Act is a ". . . basic presumption of judicial review" to anyone aggrieved by an agency action ". . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a)." 387 U.S. at 140. The Act specifically provides ". . . not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704." 387 U.S. at 140. Congress intended the Administrative Procedure Act to ". . . cover a broad spectrum of administrative actions" and ". . . only upon a showing of 'clear and convincing evidence' of a

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* The oil companies in the *Exxon* case had filed a complaint alleging that an FTC order was unlawful and beyond the scope of its powers; that it violated the constitutional rights of the oil companies; that it was a ". . . final order as to which no other relief or later review would be adequate"; and seeking declaratory and injunctive relief. In the order cited, the district court denied the FTC's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.

contrary legislative intent should the courts restrict access to judicial review." *Id.* at 140-41.

The Third Circuit, in *A. O. Smith*, has most recently applied the teachings of *Abbott Laboratories* to FTC orders, and in doing so dispelled any lingering notion that those principles might not apply to FTC orders that are not self-enforcing. Judge Aldisert noted:

> "The [Supreme] Court thus extended the presumption of reviewability, 'disregard[ing] the fact that judicial scrutiny eventually would have been available in enforcement proceedings.' *The Supreme Court, 1966 Term*, 81 *Harv. L. Rev.* 110, 227 (1967)." *A. O. Smith Corp.* v. *FTC* n. 6 (Addendum at 13).

The FTC Act does not contain any prohibition limiting review of FTC subpoenas, nor is there anything in the Act to indicate that Congress intended to restrict review in this case. *A. O. Smith Corp.* v. *FTC* (Addendum at 13).

The District Court had subject matter jurisdiction.

POINT II

The FTC's Action Is Ripe for Judicial Decision and Appellants Should Not Be Barred at the Threshold from Seeking Declaratory and Injunctive Relief.

Justice Harlan, writing for a majority of the Supreme Court in *Abbott Laboratories*, used a two-step analysis to decide whether administrative action was ripe for judicial review. Basically, Justice Harlan stated that courts should not hesitate to grant injunctive and declaratory relief to one injured by an agency determination where (1) the issues are fit for judicial review and (2) to withhold such judicial relief will result in hardship to the parties.

The present cases meet both the fitness and the hardship tests.

A. The Issues in These Cases Are Fit for Judicial Review.

The Supreme Court in *Abbott Laboratories* found the issues before it fit for judicial review, since (1) the issue was purely legal, and (2) the agency action was final. 387 U.S. at 149.

1. *The Issues Are Purely Legal*

Each complaint alleges that the FTC Subpoena exceeds the authority of the FTC and is contrary to the explicit exclusion of banks from the FTC's regulatory power. Section 6 of the FTC Act, empowering the FTC to compile information and conduct investigations, specifically excludes banks from such jurisdiction. A narrow exception to this fundamental exclusion was recently added by § 6(h) permitting the FTC to seek information from banks that is "necessary" to further an investigation of a third-party over which the FTC has jurisdiction. The scope of the Subpoenas issued to the Banks ranges far beyond this narrow exception and thereby the FTC seeks to enter into the review of an entire area of commerce—banking—from which it is precluded by statute. The terms of the Subpoenas are before the Court; whether those terms exceed the limitations on the FTC's authority is a purely legal question, requiring only that the Court interpret the FTC Act as applied to these Subpoenas.

The Banks' complaints go to the heart of the FTC's jurisdiction, and are founded upon the principle that the FTC does not have jurisdiction to investigate either banks, or bank holding companies.

The authority for the FTC's investigation is stated in its Resolutions to be §§ 6, 9 and 10 of the FTC Act (15 U.S.C. §§ 46, 49 and 50), and the FTC's Procedures and Rules of Practice (16 C.F.R. §§ 1.1 *et seq.*, and supplements thereto). None of the authorities cited by the FTC permits the investigation of a bank, bank holding company or the banking business.

The jurisdiction of the FTC is delineated in §§ 5 and 6 of the FTC Act. These sections expressly preclude FTC jurisdiction over banking.

Section 5 of the FTC Act, generally prohibiting unfair competition or deceptive acts and practices, by its explicit terms does not apply to banks:

> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, *except banks*, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." FTC Act, § 5(a)(6), 15 U.S.C. § 45(a)(6). (Emphasis added.)

Similarly, § 6(a) and (b) of the FTC Act also categorically excepts banks:

> "Sec. 6. That the Commission shall also have power—
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, *excepting banks* and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships and corporations.
>
> (b) To require, by general or special orders, persons, partnerships, and corporations engaged in or whose business affects commerce, *excepting banks* and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to

> file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require. . . ." 15 U.S.C. § 46(a), (b). (Emphasis added.)

Sections 9 and 10 of the FTC Act, also set forth in the Resolutions upon which this investigation is based, merely provide the FTC's subpoena power and sanctions for disobeying subpoenas. Neither section extends the jurisdictional grant contained in §§ 5 and 6.

Congress deliberately excluded banks and common carriers from the scope of the FTC's jurisdiction. In passing the FTC Act, Congress desired to supplement the Sherman Act by creating an agency with authority to investigate and prevent unfair competition and deceptive acts or practices by interstate enterprises not already subject to federal regulation. Banks and common carriers, already under substantial federal regulation, clearly did not need the regulation of the FTC and were excluded from its jurisdiction. *Senate Report No.* 597, 63d Cong., 2d Sess. 5; *Cong. Rec.*, 63d Cong., 2d Sess. 11081-14796.

Congress has long recognized that banks have a unique position in our society requiring special provisions for their regulation and control. It is for this reason, for example, that § 4 of the Bankruptcy Act, 11 U.S.C. § 21, specifically excludes banking corporations from those corporations which may be adjudged bankrupts. *House Report No.* 1674, 52d Cong., 1st Sess. (1892); *House Report No.* 65, 55th Cong., 2d Sess. (1897); 31 *Cong. Rec.* 1939 (1898); *Sims* v. *Fidelity Assurance Association*, 129 F.2d 442, 448 (4th Cir. 1942), *aff'd*, 318 U.S. 608 (1943).

Recent statutory developments confirm Congress' expressed mandate that banks are not to be subjected to FTC regulation, continuing to defer to existing bank regulatory

agencies to supervise matters that might otherwise be subject to FTC jurisdiction. For example, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301 *et seq.*, specially provides for the regulation of bank activities governed by the statute by banking authorities rather than the FTC. Under that Act, the Board of Governors of the Federal Reserve System is directed to consider the rules limiting deceptive practices promulgated by the FTC and if found applicable to banks they are to be enforced, not by the FTC, but rather by one of the existing bank regulatory agencies recognized in the Act.

The Supreme Court in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 336 (1963), recognizing Congress' intent to limit FTC jurisdiction to areas not previously regulated, expressly held that the FTC's jurisdiction does not reach banks:

> "The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U.S.C. § 45(a)(6).[11]"

The Court explained its holding in a footnote:

> "[11] We reject the argument that § 11 of the Clayton Act, as amended, 15 U.S.C. § 21, confers jurisdiction over banks upon the FTC. That section provides in pertinent part: 'Authority to enforce compliance with sections 13, 14, 18 and 19 of this title [§§ 2, 3, 7 and 8 of the Clayton Act, as amended] by the persons respectively subject thereto is vested . . . in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce. . . .' The argument is that since the FRB has no authority to enforce the Clayton Act against bank mergers, see note 22, *infra*, bank mergers must fall into the residual category of 'all other character

> of commerce' and so be subject to the FTC. However, there is no intimation in the legislative history of the 1950 amendment to §§ 7 and 11 that the FTC's traditional lack of jurisdiction over banks was to be disturbed. Moreover, it is clear from the language of § 11 that 'banks, banking associations, and trust companies' are meant to comprise a distinct 'character of commerce,' and so cannot be part of the 'other character of commerce' reserved to the FTC.
>
> "The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that banks were already subject to extensive federal administrative controls. See *T. C. Hurst & Son* v. *Federal Trade Comm'n.*, 268 F. 874, 877 (D.C.E.D. Va. 1920)." 374 U.S. at 336 (footnote in original).

Bank holding companies are also beyond the FTC's jurisdiction. The FTC Act does not define the term "banks"; however, its meaning is clear from the legislative intent of the Act and its context within the Act. The purpose of the FTC Act was to supply regulation to unregulated areas of commerce, hence, already regulated industries were excluded. It is evident that Congress intended the words "banks" and "common carriers" to exclude from the FTC's jurisdiction those entities which were already subjected to substantial federal regulation. Congress did not need to define or embellish the word "banks" or limit the term to a certain class or type of banks since it clearly intended to exclude the entire federally regulated banking system. Bank holding companies, unknown in 1914 when the FTC Act was passed, do not alter the nature of banking, they merely permit the federally supervised financial system to operate in a new corporate framework. Bank holding companies are now an essential part of the federal banking system, regulated by the Federal Reserve Board, and their subsidiaries must be engaged in banking or in closely related

activities. 12 U.S.C. § 1843(a), (c). Clearly then bank holding companies, as part of the federally regulated banking system, are within the exception for banks contained in the FTC Act.

Recognizing the general exclusion of banks from its authority the FTC turned to § 6(h) of the FTC Act, as recently amended, to carve out a narrow and circumscribed qualification to the basic exception for banks contained in § 6 of the Act. As amended by § 408(e) of the Trans-Alaska Pipeline Authorization Act*, § 6(h) of the FTC Act now provides, in pertinent part:

> "... the exception of 'banks ...' from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers from, any ... corporation to the extent that such action is *necessary* to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking. ..." (Emphasis added).

The amendment does not expand the FTC's jurisdiction; it merely provides that the exception for banks contained in § 6 shall not be construed to bar the FTC from collecting information necessary to an otherwise proper and authorized FTC investigation.

Rather than expanding the FTC's jurisdiction, the intent of the amendment was to increase the FTC's ability to deal with corporations already under its jurisdiction. Upon introducing the amendment on the Senate floor, Senator Henry M. Jackson stated its purpose as follows:

> "... this amendment will give to the Federal Trade Commission major new statutory authority which is

* Title IV of Pub. L. No. 93-153, 87 Stat. 576.

> designed to enable the Commission to carry out its mandate to protect the public interest through prompt and aggressive enforcement of the laws it administers." *Cong. Rec.*, 93d Cong., 2d Sess. 512968 (July 10, 1973).

Indeed this view of the statute is confirmed by its statement of purpose:

> "It is the purpose of this Act to grant the Federal Trade Commission the requisite authority to insure prompt enforcement of the laws the Commission administers. . . ." Pub. L. No. 93-153 § 408(b).

By its Subpoenas, the FTC seeks to probe far beyond the limitations of its investigatory powers, in nothing less than a direct attempt to investigate the banking business. There is no indication either on the face of the Subpoenas or the accompanying Resolutions to demonstrate that the information sought is necessary to the FTC's investigation of the energy industry. In fact, just the opposite is evident. The vast quantity of material pertaining to the Banks sought by the Subpoenas is such that they can have no purpose other than an investigation of banking.

The Banks have, at every opportunity, pressed their contention that Congress did not intend the proviso contained in the Alaska Pipeline amendment to be used as a toehold to enlarge the scope of the investigatory or regulatory functions of the FTC permitting wholesale investigation of the banking industry. The Banks thus present a significant issue that is purely legal and ripe for judicial determination.

2. *The Orders Sustaining the Subpoenas Issued by the FTC Represent Final Agency Action*

Before seeking judicial review, the Banks sought every available means of administrative relief. The Banks' objec-

tions to the Subpoenas were rejected by the FTC. Except for minor and insubstantial alterations as a result of the motions to quash, the FTC has never demanded anything less than full compliance. Accordingly, the District Court expressly found that the Banks, faced with those demands, had in fact exhausted their administrative remedies. The FTC orders enforcing these Subpoenas are "final agency action" within the meaning of § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704. *A. O. Smith Corp.* v. *FTC* (Addendum at 14).

The fact that penalties do not automatically occur in case of default does not alter the finality of the FTC's action. In *Abbott Laboratories,* plaintiffs sought pre-enforcement review of regulations promulgated by the Food and Drug Administration. The agency argued that pre-enforcement relief was barred because the regulations were not final in the sense that criminal proceedings could not be commenced without the approval of the Attorney General. The Supreme Court rejected this argument and noted that its acceptance ". . . would be adherence to a mere technicality." 387 U.S. at 152.

Yet, despite that holding in *Abbott Laboratories,* the FTC argued in *A. O. Smith Corp.* that until it seeks to enforce its orders, the district courts are without jurisdiction to entertain actions for declaratory and injunctive relief. That argument was expressly rejected both by the district court, and by the court of appeals, relying upon the Supreme Court's decisions in *Abbott Laboratories* and *Dunlop* v. *Bachowski.* (Addendum at 11).

The finality of administrative action is to be tested pragmatically. In an analysis that appears well suited to the present actions, the court in *A. O. Smith Corp.* found:

> "The FTC's action requiring LB [Line of Business] reports was also final. The LB orders issued to

> the individual companies, including all appellees, warned specifically of applicable civil fines for failure to file or for filing a false report. . . . Before appellees filed their complaints, the Commision had denied initial, renewed and amended motions to quash. During the course of this litigation there has not been a hint that the FTC intended to compromise the orders; rather, appellants have steadfastly conveyed the impression that they desire full and prompt compliance with the LB program. Thus, viewing the matter pragmatically, we have no hestitancy in concluding that the LB orders were final and, therefore, fit for judicial review." (Addendum at 14-15).

The FTC orders in *A. O. Smith* directing respondents to file line of business reports were not self-enforcing, and yet were held to be final for purposes of judicial review. The FTC's orders directing the Banks to comply with the Subpoenas are just as functionally final as the orders in *A. O. Smith*, and are therefore ripe for the District Court's consideration.

B. The Impact of the Subpoenas Is Sufficiently Direct and Immediate to Create a Hardship if Judicial Review Is Not Permitted at this Time.

The unavailability of the judicial review sought by the Banks would have left them to choose between equally painful horns of a dilemma. Yet the Court in *Abbott Laboratories* noted that the very purpose of the Declaratory Judgment Act was to relieve such a quandary. 387 U.S. at 152. Absent judicial review, the Banks would be forced either to comply with the Subpoenas, at great cost and the risk of civil liability to their customers for revealing confidential information without authority, or to refuse to

comply and risk the criminal penalties imposed by § 10 of the FTC Act, 15 U.S.C. § 50.*

Compliance with the Subpoenas by the Banks would have meant the abandonment of their right to judicial review of fundamental legal questions regarding the lack of FTC investigative authority with respect to banks. Secondly, they would run the risk of liability to customers for breach of confidentiality.

Thirdly, they would incur the burden and expense involved in attempting to comply with excessive demands. *See, e.g.*, affidavit of Michael [illegible] Esposito, Jr., Controller of Chase Corp., Appendix at [illegible]281. This latter conclusion alone presents a significant issue, for the FTC's power is obviously not unlimited. A subpoena may not be used to require production of material not reasonably relevant to an authorized investigation; and it may not be indefinite in scope. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-53 (1950). Evidence sought by subpoena must be relevant to the inquiry at hand, *FTC* v. *Standard American, Inc.*, 306 F.2d 231 (3d Cir. 1962), and not oppressive in volume, *Independent Directory Corp.* v. *FTC*, 188 F.2d 468 (2d Cir. 1951). Thus, a subpoena duces tecum requiring the production of all of the contracts for the listings and advertisements in telephone directories for eight years was held to be too burdensome. *Independent Directory Corp.* It has further been held that the issuance of a subpoena duces tecum will be considered " 'too sweeping in its terms

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* Section 10 of the Federal Trade Commission Act, 15 U.S.C. § 50, provides in pertinent part:

> "Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment."

to be regarded as reasonable' " when a demand for a mass of papers is asked for and some part of them may be relevant. *E. B. Muller & Co.* v. *FTC*, 142 F.2d 511, 520 (6th Cir. 1944) (citations omitted).

The Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, applicable to all agencies of the federal government, provides:

> "Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." 5 U.S.C. § 555(d).

The cases under that section hold that the scope of the inquiry in such subpoenas must be relevant and not burdensome. *General Engineering, Inc.* v. *NLRB*, 341 F.2d 367 (9th Cir. 1965); *FCC* v. *Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957).

An investigative subpoena issued by a federal agency with enforcement powers is not valid if the inquiry is unreasonable or oppressive. *SEC* v. *Wall Street Transcript Corp.*, 294 F. Supp. 298 (S.D.N.Y. 1968), *rev'd on other grounds*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970). This standard is applicable to the FTC, as it is to the Securities and Exchange Commission. *United States* v. *Associated Merchandising Co.*, 261 F. Supp. 553 (S.D.N.Y. 1966); *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382 (5th Cir. 1971) (citing the *Associated Merchandising* case).

Absent judicial review, the only alternative to the burdens of compliance would have been wilful default.* In that regard, it is worth noting that the specific individuals under threat of criminal sanctions were the Chairmen

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* Unsuccessful attempts to negotiate acceptable modifications to the Subpoenas are a subject beyond the record. It may be noted, however, that such efforts were made, and were unsuccessful.

of each of the Banks. While one may well speculate about the remoteness of any prospect that the FTC would have actually tried to send these gentlemen to prison, the point for the Court to consider is not that prison terms are unlikely to occur, but rather that criminal sanctions exist by statute and threats were made. "The hardship of noncompliance is the risk of criminal and civil sanctions, not the chance that no sanctions will be invoked, that controls." *A.O. Smith Corp.* v. *FTC,* 396 F. Supp. 1125, 1130 (D.Del. 1975), *aff'd in part, rev'd in part,* (3d Cir. 1976); *cf. Abbott Laboratories* v. *Gardner,* 387 U.S. at 152-53.

Nevertheless, the District Court, ostensibly relying on *Reisman* v. *Caplin,* 375 U.S. 440 (1964), and *Anheuser-Busch, Inc.* v. *FTC,* 359 F.2d 487 (8th Cir. 1966), two cases decided prior to *Abbott Laboratories,* believed the hardship element of the ripeness doctrine to be lacking. The District Court apparently reasoned that because the FTC's Subpoenas are not self-enforcing the Banks could not be harmed until the FTC commenced, and prevailed in, an enforcement proceeding under § 9 of the FTC Act, 15 U.S.C. § 49*. That conclusion, notably reached before the Third Circuit's decision to the contrary in *A.O. Smith,* failed to recognize the realities of the Banks' dilemma. While it may be, as the District Court apparently found, that the respondents could challenge the Subpoenas in an enforcement proceeding, and it may be that good faith non-compliance with an FTC subpoena precludes the imposition of the criminal penalties provided by § 10 of the FTC Act, *Anheuser-Busch, Inc.* v. *FTC,* neither of these factors

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* Section 9 of the FTC Act, 15 U.S.C. § 49, provides in part:

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence."

offered the Banks any meaningful comfort at the time they faced the election of a wilful default.

The suggestion contained in *Anheuser* that no criminal liability attaches to "good faith" non-compliance does not help. "Good faith" is a question of fact. It would be grossly unfair to mandate a gamble upon a future determination by some tribunal of the FTC's choosing that a wilful default was in good faith. This danger is emphasized by the holding of *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), which implied that criminal penalties may be imposed where non-compliance with FTC demands is justified only in part.

The existence of a potential opportunity to challenge the Subpoenas in an enforcement proceeding, as a basis for a finding that these actions are not ripe, confuses the distinction between hardship for determining ripeness and hardship for application of the equitable remedies:

> ". . . the issue of plaintiff's ability to fully assert all his defenses in an enforcement proceeding or the likelihood that plaintiff would prevail on the merits are unimportant considerations in determining ripeness. Thus, defendants' reference to cases such as *Reisman* v. *Caplin* and *Federal Trade Commission* v. *Claire Furnace Co.* completely misconstrues the important distinction between testing hardship for purposes of ripeness and testing the adequacy of some other remedy for purposes of exercising *vel non* a court's discretionary equitable jurisdiction." *A.O. Smith Corp.* v. *FTC*, 396 F. Supp. at 1130.

A careful reading of *Reisman*, the court held, ". . . compels a conclusion that ripeness was not treated [in that case]." 396 F. Supp. at 1131. The same can be said of the *Anheuser-Busch* decision, which relies heavily on *Reisman*.

As in *A.O. Smith*, the adequacy of any other remedy the Banks may have is irrelevant. The Banks here sought a

declaration that the Subpoenas were void. In addition, the prayer for relief in the complaints requested an injunction or other appropriate relief to effectuate that declaratory judgment. No motion was made, however, for a preliminary injunction. The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, explicitly provides that a court with proper jurisdiction "... may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought.*" 28 U.S.C. § 2201 (emphasis added). Federal Rule of Civil Procedure 57 provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." As a practical matter, a declaratory judgment in favor of the Banks would afford adequate relief, as it would be *res judicata* against the FTC in any subsequent enforcement action.

The suggestion contained in *Reisman* v. *Caplin* that relief should be denied where there is an adequate remedy at law is merely another way of stating the hardship requirement found in *Abbott*.

> "The concept of inadequate remedy at law, important to equity jurisdiction generally, plays so small a part in enjoining administrative action that it is seldom regarded as a separate factor from irreparable injury." 3 *Davis, Administrative Law Treatise* § 23.06, at 315 (1958).

The same commentator specifically criticized *Reisman* v. *Caplin* as "an unwelcome exception" to the present trend for denying on the ground of "adequate remedy at law" the injunctive and declaratory relief sought by Reisman. *Davis, Administrative Law Text* § 23.04, at 445 n.7 (3d ed. 1972).

On the basis of dicta in *St. Regis Paper Co.* v. *United States*, the District Court suggested that Appellants' fear of criminal penalties was unfounded, since those penalties apply only to persons and not corporations. The District

Court overlooked the facts that the Subpoenas were addressed to the Chairman of the Banks, and that the enforcement proceedings have been commenced against them. Moreover, the harm to the Banks is equally severe whether they comply with Subpoenas directly or whether the FTC obtains the information through the Bank corporate officers under threat of criminal sanctions. In either case, the Banks are faced with the cost of compliance and threat of civil liability from their customers.

The sensitive nature of banking further adds to the necessity of review at this time. Public confidence in the integrity of banking generally and in the confidentiality of customer records is crucial to banking. If the Banks involved here had to await the pleasure of the FTC to commence an enforcement proceeding to challenge these Subpoenas, their reputations as banks would be unnecessarily injured. The importance of timely review to a sensitive industry was recognized in *Abbott Laboratories:*

> "It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here." 387 U.S. at 153.

Waiting for the FTC to commence an enforcement proceeding is simply an inadequate alternative to relief in the plenary proceedings commenced by the Banks. In *A.O.*

Smith Corp. v. *FTC*, 396 F. Supp. 1125 (D. Del. 1975), the court described the FTC's enforcement action as one in the nature of mandamus and rejected it as an inadequate alternative:

> "Enforcement by mandamus is an action quite distinguished from the usual civil action. . . . 'Its purpose is to enforce rights already established, rather than to establish or declare the rights of the parties.' Because of the summary nature of mandamus proceedings, procedural rights normally associated with plenary civil actions may be curtailed. This is particularly true with respect to the use of discovery devices." *Id.* at 1134. (Citations and footnotes omitted).

In the companion case of *A. O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108 (D. Del. 1975), *aff'd in part, rev'd in part*, (3d Cir. 1976), the court again noted the summary nature of the proceeding:

> ". . . [t]here appears to be little authority for the proposition that, in a case where plaintiff has no other action available, nonetheless he has an adequate remedy at law by waiting for some anticipated enforcement proceeding, not yet filed." *Id.* at 1117.

In contrast to the hardship the Banks will suffer if this Court refuses pre-enforcement relief, the FTC will suffer little from pre-enforcement review. The FTC claims that granting pre-enforcement relief would deprive it of the right to choose the forum in an enforcement proceeding and prevent a multiplicity of pre-enforcement actions against it in scattered forums. A similar argument was made in *Abbott Laboratories* and rejected by the Supreme Court:

> "The Government contends, however, that if the Court allows this consolidated suit, then nothing will prevent a multiplicity of suits in various jurisdictions challenging other regulations. The short answer to

this contention is that the courts are well equipped to deal with such eventualities. The venue transfer provision, 28 U.S.C. § 1404(a), may be invoked by the Government to consolidate separate actions. Or, actions in all but one jurisdiction might be stayed pending the conclusion of one proceeding. See *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, 215-216. A court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere. (citations omitted.) . . .

"Further, the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed. If a multiplicity of suits are undertaken in order to harass the Government or to delay enforcement, relief can be denied on this ground alone." 387 U.S. at 155.

Clearly, the FTC's desire to establish a first option on the timing and location of any judicial review of its subpoenas is a minimal consideration compared with the significance of determining the legality of the Subpoenas, at the very least to guard against the risk of criminal sanctions.

POINT III

Since These Actions Challenge the Jurisdiction of the FTC in the Context of a Statutory Prohibition Even Pre-*Abbott Laboratories* Cases Would Afford Pre-Enforcement Review.

Even prior to the *Abbott Laboratories* trilogy, courts would decide the issue of whether an agency act was beyond the agency's authority without requiring a specific attempt at enforcement, *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407 (1942), or even exhaustion of administrative remedies, *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535

(1954); *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919), if the allegation was that the agency's act was void as opposed to erroneous.

The allegation in *Leedom* v. *Kyne* was similar to the allegation in the present actions in that the agency act in question was not only outside the delegated authority of the agency but was specifically prohibited by the statute creating the agency. In holding that the district court had jurisdiction of a suit to set aside the agency's determination even though the statute creating the agency vested the court of appeals with exclusive jurisdiction to review the agency's acts, the Court stated:

> "This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188.

CONCLUSION

Judicial scrutiny of final agency action would be illusory if its availability were left to the whim of the agency whose action is to be reviewed. The recent, controlling decisions of the Supreme Court, and other federal appellate courts, now clearly stand for the principle that a person aggrieved by an administrative fiat in excess of administrative jurisdiction and power, under threat of criminal sanctions for failure to obey, is entitled to seek and obtain prompt judicial relief. The decision of the District Court, that it had no jurisdiction to entertain an action seeking such relief,

was erroneous and contrary to persuasive and controlling precedents.

The Appellants respectfully request that this Court reverse the District Court's Order, and grant such other and further relief as may be appropriate.

Dated: New York, New York
March 26, 1976

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ADDENDUM

Opinion of the Court

(Filed Feb. 11, 1976)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1282/89

A. O. SMITH CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, EATON CORPORATION, JIM WALTER CORPORATION, REYNOLDS METAL COMPANY, W. R. GRACE & CO., WHEELING-PITTSBURGH STEEL CORP.

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

FEDERAL TRADE COMMISSION and HON. LEWIS A. ENGMAN, CHAIRMAN; HON. PAUL RAND DIXON, COMMISSIONER; HON. MAYO J. THOMPSON, COMMISSIONER; HON. M. ELIZABETH HANFORD, COMMISSIONER; and HON. STEPHEN A. NYE, COMMISSIONER,

Appellants in No. 75-1282

(D.C. Civil No. 75-15)

INLAND STEEL COMPANY

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, and HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

FEDERAL TRADE COMMISSION and HON. LEWIS A. ENGMAN, CHAIRMAN; HON. PAUL RAND DIXON, COMMISSIONER; HON. MAYO J. THOMPSON, COMMISSIONER; HON. M. ELIZABETH HANFORD, COMMISSIONER; and HON. STEPHEN A. NYE, COMMISSIONER,

Appellants in No. 75-1283

(D.C. Civil No. 75-45)

NORTHWEST INDUSTRIES, INC.

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, and HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

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Appellants in No. 75-1284

(D.C. Civil No. 75-46)

OSCAR MAYER & CO INC.

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, and HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

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Appellants in No. 75-1285

(D.C. Civil No. 75-47)

MERCK & CO., INC.

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, and HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

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Appellants in No. 75-1286

(D.C. Civil No. 75-48)

HOBART CORPORATION

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, and HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

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Appellants in No. 75-1287

(D.C. Civil No. 75-49)

THE GOODYEAR TIRE & RUBBER COMPANY

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, and HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

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Appellants in No. 75-1288

(D.C. Civil No. 75-50)

THOMAS J. LIPTON, INC.

v.

FEDERAL TRADE COMMISSION, HON. LEWIS A. ENGMAN, CHAIRMAN, HON. PAUL RAND DIXON, COMMISSIONER, HON. MAYO J. THOMPSON, COMMISSIONER, HON. M. ELIZABETH HANFORD, COMMISSIONER, HON. STEPHEN A. NYE, COMMISSIONER, and HON. ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES

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Appellants in No. 75-1289

(D.C. Civil No. 75-56)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued October 17, 1975

Before: ALDISERT, KALODNER and ADAMS, *Circuit Judges.*

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ALDISERT, *Circuit Judge*.

We are to decide whether the district court had jurisdiction to entertain pre-enforcement suits for declaratory

and injunctive relief against the Federal Trade Commission[1] and, if so, whether the court erred in refusing to dismiss the complaint or in granting a preliminary injunction. After hearing, the district court preliminarily enjoined the Commission from giving notice of default to appellees for failure to file Annual Line of Business Reports and from enforcing civil penalties for appellees' failure to file the reports. *A. O. Smith Corp.* v. *FTC*, 396 F.Supp. 1108 (D. Del. 1975) ("*A. O. Smith I*"); *A. O. Smith Corp.* v. *FTC*, 396 F.Supp. 1125 (D. Del. 1975) ("*A. O. Smith II*"). This appeal followed. We conclude that the district court had jurisdiction, but that it erred in granting preliminary injunctive relief.

Prompted by what it considered the inadequacies of existing corporate financial reporting, the Bureau of Economics recommended in 1970 that the Commission exercise its authority to require meaningful public reporting of financial information on a divisional basis as an extension of the existing Quarterly Financial Reports program. In March of 1974, the Commission submitted its proposed Line of Business (LB) Reports Form to the Comptroller General pursuant to 44 U.S.C. § 3512. The forms require, *inter alia*, detailed sales and cost data broken down into line of business categories as defined by the Commission. Finding specifically that the "information sought in the FTC LB proposal is not presently available from another source within the Federal government," the Acting Comptroller General approved the LB form, with certain provisions not here relevant, on May 13, 1974.

On August 2, 1974, the FTC adopted a resolution putting the program into effect. This resolution, which later appeared in the Federal Register, stated in part that "continuing and current financial data and statistics from

[1] The individual Commissioners and the Comptroller General of the United States were also named as defendants in the district court. The injunction ran against the FTC and the individual Commissioners. No preliminary relief was sought against the Comptroller General. Accordingly, when we use the term "Commission" in the context of this appeal, we refer to the collective interests of all appellants.

corporations within the various industries and lines of commerce of the United States'' were ''necessary for the proper functioning of the government''. 39 Fed. Reg. 30377 (1974). Pursuant to the resolution, the Commission ordered 345 of the nation's largest companies to complete and file LB reports. The orders required that reports be filed within 150 days of receipt of the orders which were served during August 1974. The orders concluded: ''You are advised that penalties may be imposed under applicable provisions of Federal law for failure to file this report or for the filing of a false report.'' App. at 328. About 250 of the companies filed timely motions to quash the LB orders; these motions were denied. Renewed and amended motions to quash followed. On January 7, 1975, the FTC denied all motions to quash. *Ibid.* at 99-106.

Seven corporations, the appellees at No. 75-1282, filed suit in the district court on January 22, 1975, seeking pre-enforcement declaratory and injunctive relief. They alleged, *inter alia,* lack of statutory authority to issue the LB orders, undue burden on the companies to comply with the orders, and failure of the Commission to promulgate the orders in accordance with the procedures for rule making prescribed by the Administrative Procedure Act. They also asserted various constitutional grounds. Six other companies, appellees at Nos. 75-1283/8, filed similar actions on February 14, 1975. Appellee at No. 75-1289 filed its action on February 24, 1975, seeking virtually the same relief. The Commission moved to dismiss the complaints; the companies moved for preliminary injunctions against enforcement of the LB orders. The district court denied the Commission's motion, and granted the corporations' motions, entering preliminary injunctions on February 19 (*A. O. Smith I*) and March 18, 1975 (*A. O. Smith II*). The Commission's appeals from both orders have been consolidated before us.

On appeal, the Commission advances alternative theories for reversal. First, it argues that the district court did not have jurisdiction to entertain this pre-enforcement suit, because the FTC Act provides for counter-enforce-

ment procedures which afford a party challenging an FTC order with an adequate remedy. *See* 15 U.S.C. § 49. Next, the Commission contends that, if the district court had jurisdiction, it should have declined to exercise that jurisdiction, because the controversy was not yet ripe for judicial resolution. Finally, the Commission urges that the district court erred in preliminarily enjoining the Commission from giving notice of default and from enforcing penalties for failure to file. Here, the FTC particularly controverts the district court's conclusion that appellees established a probability of succeeding with the merits of their rule-making claims; the Commission contends that its LB orders were issued pursuant to Section 6 of the FTC Act, 15 U.S.C. § 46, and were not subject to the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. § 553. The Commission also challenges the issuance of the preliminary injunction on the ground that appellees failed to prove they would be irreparably harmed absent the injunction.

We conclude that the district court had jurisdiction; that it properly exercised that jurisdiction because the controversy was ripe for judicial resolution; but that it erred in issuing the preliminary injunction because appellees failed to establish irreparable harm. Accordingly, we neither reach, nor express an opinion on, the question whether appellees demonstrated a probability of succeeding on the merits of their claim that the APA's rule-making provisions applied to the issuance of the LB orders.

I.

Appellants' initial argument is that the district court had no jurisdiction to entertain pre-enforcement complaints challenging the LB orders. At the outset, we note that the district court held that it had federal question jurisdiction under 28 U.S.C. § 1331, or, alternatively, jurisdiction under 28 U.S.C. § 1337. *A. O. Smith I, supra,* 396 F. Supp. at 1113; *see* Tr. Oral Arg. at 44-45. Appellants do not contest these rulings. In any event, we would agree with the district court. Thus, this case is distinguishable from

West Penn Power Co. v. *Train*, 522 F.2d 302 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U. S. Jan. 9, 1976) (No. 75-974), the primary holding of which was that the district court had not erred in dismissing the complaint because there was no independent jurisdictional predicate. *Compare ibid.* at 308 n.26 & 309-10 (majority opinion) *with ibid.* at 321 n.42 (Adams, J., dissenting).

Instead, appellants' first contention proceeds from recognition that the LB orders were issued pursuant to Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), and, as such, were not self-enforcing. Rather, the legislative schema calls for the Commission to enforce the LB orders by using the procedures set forth in Sections 9 and 10 of the Act, 15 U.S.C. §§ 49, 50. Under Section 9 the Commission may petition the court for an order in the nature of mandamus to compel the filing of a report; Section 10 provides for the issuance of notices of default, and for the accrual of civil penalties of $100 a day for each day of default after the thirtieth day following receipt of the notice. Accordingly, appellants argue that, until the FTC seeks to enforce its orders, the district courts are without jurisdiction to entertain actions for declaratory and injunctive relief.

In this argument, appellants rely on *FTC* v. *Claire Furnace Co.*, 274 U.S. 160 (1927), as modified by the holding in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961). These cases, appellants contend, stand for the proposition that, unless a notice of default has issued, there can be no judicial review of an FTC order issued pursuant to Section 6(b) until the Commission moves for enforcement under Section 9. *See, e.g., Genuine Parts Co.* v. *FTC*, 445 F.2d 1382 (5th Cir. 1971).[2] Since the Commission had not moved

[2] Supporting its thesis that actions may not be maintained against the Commission prior to the issuance of notices of default, appellants find analogies in cases implicating attempts to enjoin the enforcement of summons issued by the Internal Revenue Service, *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Reisman* v. *Caplin*, 375 U.S. 440 (1964), or of subpoenas issued by grand juries, *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973). We agree with appellees that enforcement of administrative summons, or grand jury subpoena, cases do not reach the fundamental questions raised in this appeal.

effectively for enforcement of the LB orders against any of the instant appellees, *see A. O. Smith I, supra,* 396 F. Supp. at 1112; *A. O. Smith II, supra,* 396 F. Supp. at 1129, appellants urge that the district court had no jurisdiction to hear the cases.

The appellees' response is that the *Claire Furnace-St. Regis* formula no longer controls. They point out that *Claire Furnace* antedated the Declaratory Judgment Act by some seven years and the Administrative Procedure Act by some 19 years. *See Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 142 & nn.4-6 (1967). Most important, contend appellees, the paramount principles *today* in deciding whether federal courts have jurisdiction to *review* administrative actions derive from the Supreme Court's 1967 *Abbott Laboratories* trilogy,[3] recently reaffirmed in *Dunlop* v. *Bachowski,* 421 U.S. 560 (1975). The district court agreed with appellees. So do we.[4] Accordingly, we turn to an analysis of the legal precepts Justice Harlan articulated in *Abbott Laboratories* and their application to the facts at hand.

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[3] *Abbott Laboratories* v. *Gardner,* 387 U.S. 136; *Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158; *Gardner* v. *Toilet Goods Ass'n,* 387 U.S. 167. Professor Davis calls *Abbott Laboratories* "the overshadowing case". K. DAVIS, ADMINISTRATIVE LAW TEXT § 21.04, at 404 (1972).

[4] As we must be cognizant of the present vitality of many rules enunciated by old and venerable cases, we must also be alert to Roscoe Pound's observation: "Now, the fact is, as far as rules are concerned, the life of a rule of law in the strict sense is relatively short. I had occasion in 1924, at the request of a committee of the American Bar Association, to investigate the reports beginning in 1774, at intervals of fifty years, down to 1924, and the thing that struck me as I went on with that, and could be shown conclusively as I had finished it, was that the general run of rules of law . . . had a life of simply one generation. Fifty years is a long life for a rule, that is, a legal precept that attaches a definite detailed legal consequence to a definite detailed state of facts. And it is with rules, very largely, that this doctrine of *stare decisis* has its immediate application." Pound, *Survey of the Conference [on the Status of the Rule of Judicial Precedent] Problems,* 14 U. CIN. L. REV. 324, 329 (1940). *See also* Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 TUL. L. REV. 475, 482-86 (1933).

The fundamental jural lesson flowing from *Abbott Laboratories* is this: a person aggrieved by final agency action may come to federal court for judicial review "so long as [*a*] no statute precludes such relief or [*b*] the action is not one committed by law to agency discretion." 387 U.S. at 140. Appellants do not claim applicability of either exception; nor do we find one obtained. As the Supreme Court said in *Abbott Laboratories*, and reiterated last term in *Dunlop* v. *Bachowski*,[5] "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Ibid.* at 141, repeated in *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 567; *see, e.g., Pollard* v. *Romney*, 512 F.2d 295, 298 (3d Cir. 1975).[6] We have examined the FTC Act and find no clear and convincing evidence of a congressional intent to bar judicial review of final FTC orders under Section 6(b). For this reason, appellants' reliance on *Getty Oil Co.* (*Eastern Operations*), *Inc.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972) *cert. denied*, 409 U.S. 1125 (1973), is misplaced. There, we held that Section 307 of the Clean Air Act demonstrated a clear congressional intent to limit judicial review of the Environmental Protection Administrator's actions to the courts of appeals. Accordingly, we concluded that the district court was without jurisdiction to entertain a suit seeking to enjoin enforcement of an EPA compliance order: Getty had sought judicial review in the wrong court. See *ibid.* at 356, 357-58 n.14.

II.

A second teaching of *Abbott Laboratories* is that, where the party aggrieved seeks injunctive and declaratory relief as

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[5] The reiteration of this principle in *Dunlop* deflates any force that might otherwise have attached to appellants' argument that *Abbott Laboratories* applied only to FDA orders.

[6] The Court thus extended the presumption of reviewability, "disregard[ing] the fact that judicial scrutiny eventually would have been available in enforcement proceedings." *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 110, 227 (1967).

here, since those remedies are discretionary, the court should hesitate to apply them unless (a) the issues are fit for judicial resolution and (b) withholding judicial consideration would result in hardship to the parties. *Abbott Laboratories, supra,* 387 U.S. at 149. As Judge McGowan recently observed, this law of "ripeness", once a tangled web of special rules and distinctions, is since *Abbott Laboratories* "very much a matter of practical common sense." *Continental Air Lines, Inc.* v. *CAB,* 519 F.2d 944, (D.C. Cir. 1975).

A.

In assessing the fitness of the challenge to FDA actions for judicial decision, Justice Harlan looked to two factors: (1) the nature of the issues, which he denominated "purely legal", *Abbott Laboratories, supra,* 387 U.S. at 149, and (2) the finality of the agency actions. These guidelines are consonant with the underlying rationale for the ripeness doctrine—"to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized . . . ." *Ibid.* at 148. *See also Weinberger* v. *Salfi,* 422 U.S. 749, 765 (1975).

Here, the ultimate issues raised by appellees' challenges to the LB orders are purely legal: whether the promulgation of the LB resolution exceeded the Commission's authority or was in the nature of an administrative rule so as to require prior compliance with rule-making procedures specified in the APA. Further factual development would not sharpen the issues; nor does judicial consideration at this stage in any way usurp the Commission's fact-finding prerogatives.

The FTC's action requiring LB reports was also final. The LB orders issued to the individual companies, including all appellees, warned specifically of applicable civil fines for failure to file or for filing a false report. *See* page 8 [9],

supra. Before appellees filed their complaints, the Commission had denied initial, renewed and amended motions to quash. During the course of this litigation there has not been a hint that the FTC intended to compromise the orders; rather, appellants have steadfastly conveyed the impression that they desire full and prompt compliance with the LB program. Thus, viewing the matter pragmatically, we have no hesitancy in concluding that the LB orders were final and, therefore, fit for judicial review.

B.

In measuring ripeness from the standpoint of whether withholding judicial review would result in hardship to the parties, the Supreme Court requires that the impact on the complaining party be "sufficiently direct and immediate."[7] *Abbott Laboratories, supra*, 387 U.S. at 152. As the Court elaborated:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance . . . .

Ibid. at 153. *See generally*, K. DAVIS, ADMINISTRATIVE LAW TEXT § 21.04, especially at 404-06 (1972).

One reason for scrutiny of the "hardship to the parties" aspect of the ripeness formula is that the factual complex—but not necessarily all of it—relevant to hardship will also be relevant to the question of "irreparable injury" which

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[7] That a challenge to administrative action will not be fit for judicial review unless there is an impact on the challenger derives in part from the Article III requisite for a live case or controversy. *See generally Warth* v. *Seldin*, 422 U.S. 490 (1975), especially at 498-502 and n.10. Thus, in actuality, there can be no bright line of demarcation between constitutional requirements and the equitable and discretionary standards Justice Harlan discussed in *Abbott Laboratories*. Suffice it to say that ours is not a constitutional analysis.

must be satisfied, should it be reached, before an injunction may issue. We perceive the two concepts—"hardship to the parties" and "irreparable injury"—to be jurisprudential cousins, not identical twins. The same analytical factors may or may not support each concept; the context in which the factors are utilized is critical. Thus, certain factors will dominate in considering hardship to the parties, while different factors may be critical in considering irreparable injury for purposes of issuing a preliminary injunction; still other factors may come into play when irreparable harm is considered in the context of a request for a permanent injunction.

Another reason for careful analysis in this area is that not every impact will be sufficiently direct and immediate. This much is clear from the *Abbott Laboratories* trilogy. There, the Court differentiated among the factual complexes presented to it. At issue in *Abbott Laboratories* was an FDA order "requiring labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used anywhere in such material." 387 U.S. at 139. The Court found the impacts sufficiently direct and immediate:

> These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, "Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution." 228 F.Supp. 855, 861. The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency's counsel represented to the District Court that

> immediate compliance with their terms was expected. If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance—continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner—may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of "misbranded" drugs.
>
> It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily.

Ibid. at 152-53 (footnotes omitted). In *Gardner* v. *Toilet Goods Ass'n*, *supra*, the challenge was to FDA regulations regarding color additives and hair dyes. The Color Additive Amendments of 1960 had allowed the FDA to prescribe conditions for the use of color additives, requiring clearance and certification of each "batch" of each additive. 21 U.S.C. §§ 321(t), 376. Two of the challenged regulations included as color additives substances alleged to fall outside the statutory definition. 21 C.F.R. § 8.1(m) (1967) (diluents); 21 C.F.R. § 8.1(f) (1967) ("Lipstick, rouge, eye makeup colors, and related cosmetics intended for coloring the human body"). A statutory exemption for hair dyes bearing a designated cautionary label, 21 U.S.C. §§ 361(a), (e), was alleged to be undercut by a third regulation, 21 C.F.R. § 8.1(u) (1967). Again, the Court found sufficiently direct and immediate impacts:

> Faced with these regulations the respondents are placed in a quandary. On the one hand they can, as the

> Government suggests, refuse to comply, continue to distribute products that they believe do not fall within the purview of the Act, and test the regulations by defending against governmental criminal, seizure, or injunctive suits against them. We agree with the respondents that this proposed avenue of review is beset with penalties and other impediments rendering it inadequate as a satisfactory alternative to the present declaratory judgment action.
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> [I]f respondents, failing judicial review at this stage, elect to comply with the regulations and await ultimate judicial determination of the validity of them in subsequent litigation, the amount of preliminary paper work, scientific testing, and recordkeeping will be substantial.

387 U.S. at 172-73. On the other hand, in *Toilet Goods Ass'n* v. *Gardner, supra,* the challenge was to a regulation providing that if a person refused to permit authorized FDA employees access to regulated manufacturing facilities, the FDA might suspend certification service to that person. The Court found a want of ripeness, noting:

> This is not a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae . . . . Moreover, no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection. Unlike the other regulations challenged in this action, in which seizure of goods, heavy fines, adverse publicity for distributing "adulterated" goods, and possible criminal liability might penalize failure to comply, see *Gardner* v. *Toilet Goods Assn., post,* p. 167, a refusal to admit an inspector here

> would at most lead only to a suspension of certification services to the particular party . . . .

387 U.S. at 164-65.

Thus, it appears from the *Abbott Laboratories* trilogy that one seeking discretionary relief may not obtain pre-enforcement judicial review of agency action if there is no immediate threat of sanctions for noncompliance, or if the potential sanction is de minimis. Conversely, the court should find agency action ripe for judicial review if the action is final and clear-cut, and if it puts the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action's validity, he must change his course of day-to-day conduct, for example, by undertaking substantial preliminary paper work, scientific testing and recordkeeping, or by destroying stock; alternatively, if he does not comply, he risks sanctions or injuries including, for example, civil and criminal penalties, or loss of public confidence.

In this case, the LB order issued to each of the appellees was clear-cut. As previously rehearsed, there was never any doubt but that the FTC contemplated full and prompt compliance. By the time appellees filed suit, the agency action requiring the LB reports was final: the Commission had denied original motions to quash, as well as renewed and amended motions. Appellees were placed in an immediate and real quandary: if they chose to comply with the LB orders, as more than 200 companies did, they would have had to commit substantial resources—both in terms of money and manpower—to develop accounting techniques necessary for compliance and, as a result, suffer loss of profits;[8] alternatively, they could refuse to comply, await

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[8] The controller of one corporation had estimated compliance with the LB order would require eight months and an expenditure of about $400,000. Tr. Oral Arg. at 20. Other estimates of the cost of compliance exceeded one million dollars per corporation. *See A.O. Smith I, supra,* 396 F.Supp. at 1118.

FTC enforcement and risk civil fines for noncompliance. *See A. O. Smith I, supra,* 396 F.Supp. at 1115-16.[9] Thus, the potential harm to appellees seems to fall between the de minimis sanction in *Toilet Goods Ass'n* v. *Gardner, supra,* and the draconian alternatives faced in *Gardner* v. *Toilet Goods Ass'n, supra,* and *Abbott Laboratories* v. *Gardner, supra.* We have determined that these facts more closely approximate those in *Gardner* and *Abbott Laboratories* than those in *Toilet Goods.* Here, the consequences of noncompliance are serious and the effects of compliance on primary day-to-day conduct are immediate. At the very least, the LB orders necessitate changes in internal record-keeping and accounting. The Supreme Court has acknowledged that such an impact may be sufficiently direct and immediate for ripeness purposes. *Compare Toilet Goods Ass'n* v. *Gardner, supra,* 387 U.S. at 164 *with Gardner* v. *Toilet Goods Ass'n, supra,* 387 U.S. at 173.

Accordingly, we hold that the district court did not err either in determining that it had jurisdiction to entertain the complaints or in using its discretion to exercise jurisdiction, because the controversy surrounding the FTC's action was ripe for judicial decision. The only question remaining is whether the district court committed reversible error in issuing preliminary injunctions.

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[9] The district court relied in part on the possibility of criminal sanctions as well. *See A.O. Smith I, supra,* 396 F.Supp. at 1116 & n.12. At oral argument, the Commission asserted that criminal sanctions could not be imposed on appellees because the LB orders were directed to the corporations—not their officers—and the criminal penalties of Section 10 do not apply to corporations. *See, e.g.,* Tr. Oral Arg. at 17. While we agree that the criminal provisions of Section 10 would not obtain against the corporations before us, this does not mean that Section 10 criminal penalties do not lurk in the background. In any event, because of the view we take of the non-criminal impacts of the LB orders, the Commission's point need not detain us.

III.

In reviewing the grant or denial of preliminary injunctions over the years, this court has emphasized the following considerations:

1. The law has entrusted the power to grant or dissolve an injunction to the discretion of the trial court in the first instance, and not to the appellate court. *Stokes* v. *Williams*, 226 Fed. 148, 156 (3d Cir. 1915), *cert. denied*, 241 U.S. 681 (1916).

2. Unless the trial court abuses that discretion, commits an obvious error in applying the law, or makes a serious mistake in considering the proof, the appellate court must take the judgment of the trial court as presumptively correct. *Ibid.*; *see Oburn* v. *Shapp*, 521 F.2d 142, 147 (3d Cir. 1975); *United States* v. *Ingersoll-Rand Co.*, 320 F.2d 509, 523 (3d Cir. 1963).

3. "This limited review is necessitated because the grant or denial . . . is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief." *United States Steel Corp.* v. *Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970).

4. In exercising its limited review of the grant or denial of preliminary injunctive relief, the appellate court asks: (a) Did the movant make a strong showing that it is likely to prevail on the merits? (b) Did the movant show that, without such relief, it would be irreparably injured? (c) Would the grant of a preliminary injunction substantially have harmed other parties interested in the proceedings? (d) Where lies the public interest? *Commonwealth of Pennsylvania ex rel. Creamer* v. *United States Dep't of Agriculture*,

469 F.2d 1387, 1388 n.1 (3d Cir. 1972) (per curiam); *Croskey Street Concerned Citizens* v. *Romney*, 459 F.2d 109, 112 (3d Cir. 1972) (concurring opinion). Also see *Oburn* v. *Shapp*, *supra*, 521 F.2d at 147; *Delaware River Port Authority* v. *Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974).

5. "The applicant for a preliminary injunction bears the burden of establishing a right to such injunctive relief and that irreparable injury will result to him if it is not granted." *Joseph Bancroft & Sons Co.* v. *Shelley Knitting Mills, Inc.*, 268 F.2d 569, 574 (3d Cir. 1959) (footnote omitted). Moreover, we have emphasized "the elementary principle that a preliminary injunction shall not issue except upon a showing of irreparable injury." *National Land & Investment Co.* v. *Specter*, 428 F.2d 91, 97 (3d Cir. 1970).

In examining claimed aspects of the irreparable injury that would befall appellees in the absence of an injunction pendente lite, two other factors command our attention. First, as previously rehearsed, irreparable harm, as a concept to be considered in the context of a preliminary injunction, is related to, but not the equivalent of, the hardship-to-the-parties ingredient of the *Abbott Laboratories* ripeness test. Second, the requisite is that the feared injury or harm be irreparable—not merely serious or substantial. "The word means that which cannot be repaired, retrieved, put down again, atoned for. . . . Grass that is cut down cannot be made to grow again; but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that compensation in money cannot atone for it . . . ." *Gause* v. *Perkins*, 3 Jones Eq. 177, 69 Am. Dec. 728 (1857). "Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate." *Danielson* v. *Local 275, Laborers Union*, 479 F.2d 1033, 1037 (2d Cir.

1973). *See generally* E. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES 1018-35 (1975).

Against this backdrop we consider first whether the trial court erred when it concluded that the appellees had met their burden of proving they would suffer irreparable harm or injury in the absence of an injunction pendente lite. The district court in *A.O. Smith I* stated:

> The alleged injury suffered by plaintiffs goes either to the unrecoverable costs and commitment of diverse business resources including managerial talent with concomitant loss of profits incident to preparation and compliance with the Commission orders plaintiffs assert to be invalid, or in the event of noncompliance, irreparable harm threatened by criminal and civil sanctions. The immediacy of the injury is evident; plaintiff has already incurred some costs incident to compliance and the time constraints placed upon plaintiffs by the FTC are narrow. The Court concludes plaintiffs will suffer immediate, irreparable injury.

396 F. Supp. at 1118. In its second opinion, the district court amplified:

> Defendants correctly point out that the availability of discovery in summary enforcement proceedings is not categorically foreclosed to either party. Rather, the court to which enforcement application is made has discretion to allow as much discovery as is consistent with the need for expeditious adjudication of the issues before it. *See FTC* v. *Kujawski*, 298 F. Supp. 1288, 1290 (N. D. Ga. 1969); *cf. Venn.* v. *United States*, 400 F.2d 207, 212 n.12 (5th Cir. 1968); *United States* v. *Moriarity*, 278 F. Supp. 137 (E.D. Wis. 1967). This, however, introduces an element into a court's decision to allow discovery in a summary enforcement context which is not present in a plenary pre-enforcement ac-

tion, i.e., the "tension between speedy adjudication and fairness to the investigated party." *FTC* v. *Kujawski*, 298 F. Supp. at 1290.

In the Court's view, it is this tension which renders plaintiffs' remedy by way of summary enforcement suit inadequate *vis-à-vis* plenary pre-enforcement proceedings. In the context of a summary enforcement suit in which a prompt determination of the need for compliance with an administrative order is demanded, a court may be understandably ill-disposed to grant requests for discovery which would be otherwise permissible in a plenary civil action. *See, e.g., United States* v. *Associated Merchandising Corp.*, 256 F. Supp. 318 (S.D.N.Y. 1966).

This is not to say that a pre-enforcement injunction may issue in every instance in which there appears the possibility that discovery in a pending enforcement proceeding may be limited. Where, as here, however, plaintiffs are able to demonstrate a likelihood of success on the merits and may need the panoply of discovery devices envisioned by the Federal Rules if they are ultimately to carry the burden of persuasion, this Court may invoke its equitable powers to afford the discovery needed.

Given the foregoing considerations and in view of plaintiffs' demonstrated need for full discovery on several issues, the Court reiterates that the mandamus proceedings contemplated by the Commission are not an adequate vehicle for the adjudication of rights plaintiffs here assert. Accordingly, . . . the Court concludes plaintiffs will suffer immediate irreparable injury.

A. O. Smith II, supra, 396 F. Supp. at 1134-35 (footnotes omitted). Thus, in concluding that appellees would suffer irreparable injury absent an injunction pendente lite, the

district court relied on consideration of: (a) the asserted difference in the scope of discovery available in a pre-enforcement, as opposed to a counter-enforcement, action; (b) "the unrecoverable costs and commitment of diverse business resources . . . incident to preparation and compliance with the Commission orders"; and (c) potential criminal and civil sanctions for noncompliance or faulty compliance.

A.

We may begin by conceding that the scope of discovery in a summary enforcement proceeding *might* be different from that in a plenary suit, just as it *might* be different if the suit were heard in district A instead of district B, or before judge X instead of judge Y. However, we could hardly elevate such a speculative and fortuitous procedural variance to the status of irreparable harm without seriously—perhaps irreparably—undermining the salutary limitation that concept places on the exercise of the injunctive power. Further, we agree with the district court that the availability of discovery in a summary enforcement proceeding is not foreclosed to either party. Whether the matter is litigated now or later, the companies' position will be the same—an attack on the FTC's institution of the LB program: the companies will insist that the full panoply of rule-making procedures apply, while the FTC will contend that its resolution was not rule making but permissible report gathering under Section 6 of the FTC Act. In either case, the compass of available discovery is circumscribed by the requirement that discovery be "relevant to the subject matter involved in the pending action", F.R. Civ. P. 26(b)(1), and not by the form of the action. In either action, discovery may be "limited by order of the court", F.R. Civ. P. 26(b). If the action is a summary enforcement under Section 9, there may be a " 'tension between speedy adjudication and fairness to the investigated

party' '', *A. O. Smith II, supra,* 396 F. Supp. at 1134, suggesting that bounds to discovery be set. On the other hand, if the action is for pre-enforcement review, as here, the district court must bear in mind that what is to be reviewed is administrative agency action entitled to some judicial deference; accordingly, full, unbridled discovery may be inappropriate. *Cf. Dunlop* v. *Bachowski,* 421 U.S. 560, 571 (1975). Indeed, in this pre-enforcement action, the district court has limited the scope of appellees' discovery. We conclude, therefore, that the possible variation between the scope of discovery available to appellees in this action and the scope of discovery that would be available to them in defending a later enforcement action does not constitute irreparable harm for purposes of a preliminary injunction. Our conclusion that the variation is only possible necessarily encompasses a determination that, in any event, appellees failed to carry their burden on this aspect of their claimed irreparable injury.

B.

In *A. O. Smith I, supra,* the district court alluded to the claim of unrecoverable costs of compliance as an element of irreparable injury. In the context here presented, we find that this asserted harm did not constitute irreparable injury. At issue was a *preliminary* injunction—a form of relief requiring a strong showing of necessity. Furthermore, the alleged injury was "unrecoverable costs and commitment of diverse business resources." Without intending to disparage the importance of such an injury, we observe that all that is lost is profits. Any time a corporation complies with a government regulation that requires corporate action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction. Rather, in cases like these, courts ought to hearken to the basic principle of equity that the threatened in-

jury must be, in some way, "peculiar".[9a] *See Gause* v. *Perkins, supra.* These are not "small" corporations; there is no contention that compliance with the LB program would render any appellee unable to meet its debts as they come due. Nor is there any contention that the cost of compliance would be so great *vis à vis* the corporate budget that significant changes in a company's operations would be necessitated. Nor is this a case where compliance would permanently injure the corporation's reputation, or its goodwill. If, in the final analysis, the Commission's authority to order the reports is upheld, the cost of compliance will have to be considered a necessary business expense, albeit government mandated, and not a loss of profits in any usual sense of that term.

Moreover, even assuming that the asserted harm could, in these circumstances, constitute irreparable injury, the district court's summary conclusion on the irreparable harm issue is unsupported by basic findings of fact. The district court's opinion made reference to the median cost of compliance ($50,000) and to estimates that some companies might have to expend in excess of one million dollars in preparing LB reports. *A. O. Smith I, supra,* 396 F. Supp. at 1118. But it did so in the context of discussing the public interest, not irreparable injury. Moreover, the sources of

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[9a] We have not here attempted "to fashion a general rule—applicable to other factual situations . . . ," as inferred in the instant concurring opinion. We formulate only a specific rule,—we draw a "definite detailed legal consequence" from "a definite detailed state of facts." Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 TUL. L. REV. 475, 482 (1933). We do not subscribe to the concurring opinion's interpretation, *post* n.2, that we would require as a minimum showing for purposes of proving irreparable harm in the pendente lite context "a corporate liquidity crisis or significant changes in company operations." Nor do we subscribe to the concurring opinion's implication that statistical figures from government reports can never serve as an evidentiary predicate for a finding of irreparable harm.

these figures were government reports,[10] not specific evidence submitted by appellees. *See* App. at 48, 100. In *A. O. Smith II*, *supra*, on the other hand, the district court did not even mention the claim of unrecoverable costs in its analysis of irreparable injury.

At this juncture, we hasten to add that we do not reach the question of whether, if proved at final hearing, loss of profits from compliance with the LB orders could constitute irreparable injury in the context of a permanent injunction.[11] We specifically reserve that issue for another day.

C.

The district court's reliance on the possibility of civil fines—in the amount of $100 a day to commence 30 days after the FTC served a notice of default—was also misplaced. The appellees, as previously noted, are not "small" corporations. The FTC resolution to require LB reports stemmed from recommendations in a memorandum from Russell C. Parker, Assistant to the Bureau of Economics, reprinted in "Role of Giant Corporations," *Hearings Before the Subcommittee on Monopoly of the Senate Select Committee on Small Business*, 92d Cong., 1st Sess. Pt 2A

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[10] The median cost figure was contained in the Commission's memorandum in support of its denial of all motions to quash. App. at 100. The estimates of compliance costs exceeding one million dollars originated in the Comptroller General's evaluation of the LB program. The latter report, in turn, was based on submissions from several companies, including several appellees, *see* App. at 56-57, but none of the appellees at No. 75-1282 was among the companies whose estimates of cost the Comptroller General summarized, *see* App. at 48.

Appellees submitted affidavits and adduced testimony which might have supported a specific finding on the point, but the district court did not predicate its conclusion of irreparable injury on those materials.

[11] Although certain references have been made to the application for a permanent injuction, we note that appellees also sought declaratory relief. For similarities and differences in standards relating to injunctive and declaratory relief *see Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Zwickler* v. *Koota*, 389 U.S. 241 (1967).

at 1807-17 (1972). Nor, as previously stated, are we confronted with a situation where any appellee has proved that compliance with the LB program would render it unable to meet its debts as they come due.[12] In these circumstances, we conclude that the threat of civil penalties was de minimis; in the context of the required showing for a preliminary injunction it did not rise to the level of irreparable injury.

Finally, in assessing irreparable injury, the district court alluded to possible criminal penalties. Appellants vehemently contend that appellees are not subject to criminal sanctions. *See* n.9 *supra*. Whatever the merit of appellees' rebuttal to that argument as it affects ripeness, the brute fact is that, in the context of the irreparable injury element requisite to a preliminary injunction, appellees have failed to prove that absent an injunction pendente lite *they* would be subject to criminal sanctions.

Accordingly, we hold that the district court erred in finding that appellees had sustained their burden of proving irreparable injury. Such a finding is a necessary ingredient to the issuance of a preliminary injunction. *National Land & Investment Co.* v. *Specter, supra*. Therefore, the district court's order may not stand. Nor need we reach other issues tendered by the parties in this appeal, *viz.*, the appellees' likelihood of success on the merits, the effect of a preliminary injunction on other interested parties, or the public interest in the grant or denial of a preliminary injunction.

That part of the district court's order denying appellants' motion to dismiss the complaints for want of jurisdiction will be affirmed; that part granting preliminary injunctions will be vacated.

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[12] We express no opinion on whether a different rule might obtain in circumstances different from those before us.

To the Clerk:

Please file the foregoing opinion.

A. O. SMITH CORP., et al. v. FEDERAL TRADE COMMISSION, et al., appellants—Nos. 75-1282/9

ADAMS, *Circuit Judge*, concurring:

I agree with parts I and II and with section C of Part III of the majority opinion. In reversing the grant of the preliminary injunctions entered in this case, however, I would limit our holding to the failure of the plaintiffs to demonstrate, in the record before the district court, irreparable harm. Such a course would avoid the unnecessary resolution of certain knotty issues.

Some cost of compliance with a Federal Trade Commission order is concededly inevitable, but the record here does not show with particularity the burden such compliance would impose upon the individual plaintiffs. To find irreparable harm in this regard the district court appears to have relied only on statistical figures from governmental reports.[1] A record this scanty is inadequate, in my judgment, to show irreparable injury by any standard. Thus, there does not appear to be any necessity for the Court to fashion a general rule—applicable to other factual situations—for determining whether the cost of compliance would inflict irreparable injury.[2]

Nor is there a basis in the record for concluding that differences in the extent of discovery, depending upon the type of proceeding available to the litigants, can never constitute irreparable harm.[3] The record in this case does not estab-

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[1] *See* majority opinion at 35 *supra*.

[2] *Compare* majority opinion at 34 *supra*. I am not prepared to hold, at least on the basis of this record, that, short of provoking a corporate liquidity crisis or significant changes in company operations, cost of compliance can never be the basis of a finding of irreparable harm for the purpose of granting injunctive relief.

[3] The plaintiffs contend that without a preliminary injunction, they will be subjected to enforcement proceedings in the Southern District of New York. In that event, plaintiffs contend, discovery might be limited because enforcement by mandamus is a summary proceeding in which a court may curtail recourse to discovery that is otherwise available in plenary civil actions such as the present suit for injunctive relief.

lish that mandamus proceedings would necessarily occasion a scope of discovery so much narrower than the scope of discovery available in this suit for injunctive relief that plaintiffs would be irreparably harmed thereby.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK.

Gabriella Govorcin being duly sworn, says: that I am over the age of eighteen years and am not a party herein, and that on the 26th day of March , 19 76, I served a true copy of the within Brief

upon the attorneys hereinafter named at the places hereinafter stated and set opposite their respective names by depositing the same, properly enclosed in a post-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department at 399 Park Avenue within the City and State of New York, directed to said attorneys at their respective addresses given below, which were designated by them for that purpose upon the preceding papers in this action, to wit:

Name	Address	Attorney for
Robert J. Lewis, Esq.	Federal Trade Commission Washington, D.C. 20580	Defendants-Appellees
Gerald P. Norton, Esq.	Federal Trade Commission Washington, D.C. 20580	Defendants-Appellees
Gerald Harwood, Esq.	Federal Trade Commission Washington, D.C. 20580	Defendants-Appellees
Warren S. Grimes, Esq.	Federal Trade Commission Washington, D.C. 20580	Defendants-Appellees
William A. Horne, Esq.	Federal Trade Commission Washington, D.C. 20580	Defendants-Appellees

Gabriella Govorcin

Gabriella Govorcin

Sworn to before me this
26th day of March , 1976.

Notary Public, State of New York
No. 41-4505800
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1977